Supreme Court, U.S.
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No. 95-465

In The

Supreme Court of the United States

October Term, 1995

LAGUNA GATUNA, INC., A New Mexico Corporation,

Petitioner,

v.

CAROL M. BROWNER, Administrator of the Environmental Protection Agency, JANE N. SAGINAW, Regional Administrator, Region VI of the Environmental Protection Agency, and the ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY TO OPPOSITION

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ARGUMENT

I. DEFENDANTS ADMIT THAT THIS COURT SHOULD GRANT CERTIORARI GIVEN THE DENIAL OF DUE PROCESS IN THIS CASE IN WHICH ALL ACCESS TO THE COURTS HAS BEEN FORECLOSED.

Defendants admit that "[t]he absence of judicial review may offend due process in extreme cases where 'the practical effect of coercive penalties is to foreclose all access to the courts.' "[1] This case is the very case of which Defendants write. This is that "extreme case[] where the practical effect of coercive penalties is to foreclose all access to the courts."

Petitioner was given a cease and desist order by Defendants. The violation of that order – and according to the courts below a violation of the order is the only manner in which Petitioner can obtain judicial review of the order – would subject Petitioner to a $25,000 a day fine and jail time.[2] Petitioner cannot afford to expose itself to such coercive penalties to obtain judicial review. As a result, Petitioner's access to the courts has been foreclosed.

Defendants cannot have it both ways. Defendants cannot assert, as a philosophical matter, that "[t]he absence of judicial review may offend due process in extreme cases where 'the practical effect of coercive penalties is to foreclose all access to the courts,' " but then

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[1] Respondents' Brief at 15, citing *Thunder Basin Coal Company v. Reich*, 510 U.S. ___, 114 S.Ct. 771, 782 (1994).

[2] 33 U.S.C. §1319(c)(1).

when confronted with just such a case, pretend that it does not exist. Applying the standard embraced by Defendants, this Court should grant certiorari.

II. DEFENDANTS' ASSERTION THAT THE ENVIRONMENTAL PROTECTION AGENCY'S CEASE AND DESIST ORDER IMPOSES NO PENALTY OR SANCTION AND DOES NOTHING TO ALTER THE LEGAL POSITION OF PETITIONER IS SIMPLY UNTRUE.

Defendants' assertion that the Environmental Protection Agency's (EPA) issuance of a cease and desist order against Petitioner carries with it no sanctions and does nothing to change Petitioner's legal position is not only untrue, but is an audacious and arrogant misrepresentation of the facts below and the situation in which Petitioner finds itself.[3]

On January 19, 1989, the EPA and the United States Army Corps of Engineers entered into a "Memorandum of Agreement [MOA] Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Geographic Jurisdiction of the Section 404 program and the Application of the

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[3] [T]he compliance order is not self enforcing. It imposes no penalty or other sanction. The issuance of such a compliance order does nothing to alter the legal position of the alleged violator. . . . In effect, the compliance order merely apprises the alleged violator of the agency's pre-enforcement position. Its issuance is by no means a final administrative determination that a violation has occurred.

Respondents' Brief at 13-14.

Exemptions Under Section 404 (f) of the Clean Water Act."[4] The MOA specifically states: "[c]ase-specific determinations made pursuant to the terms of this [MOA] will be binding on the Government and [will] represent the Government's position in any subsequent Federal action or litigation regarding the case."[5] Thus, contrary to Defendants' assertion, a determination by the EPA that an area constitutes "waters of the United States," such as the one made regarding Petitioner's land, is final agency action.

Not only does issuance of a compliance order that an area is "waters of the United States" constitute final agency action, it "alter[s]" in a very significant way "the legal position of" Petitioner. If Petitioner had violated the cease and desist order issued by EPA, then Petitioner would have been subject to civil penalties of up to $25,000 per day, criminal penalties of up to $25,000 per day plus one year in prison, as well as administrative penalties of $125,000 per violation.[6] In addition, since any violation by Petitioner, in order to gain access to court, would have been "knowing," the penalty would have increased to $50,000 per day and up to three years in jail.[7] In other words, "the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate [Petitioner] and its officers from resorting to

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[4] Reprinted in 19 Env. L. Rep. 35181.

[5] *Id.*

[6] 33 U.S.C. §1319(c)(1), (d) & (g).

[7] 33 U.S.C. §1319(c)(2). This represents double the fine and a three fold increase in jail time.

the courts."[8] Is Petitioner's fear of such monstrous penalties a reasonable one? The answer is: "Yes!" When asked by the Court of Appeals what penalties Defendants would seek should Petitioner violate the cease and desist order to obtain judicial review, Defendants' attorney responded: "We would seek the *maximum*."[9]

Under the cease and desist order issued by EPA, Petitioner is faced with "an abandonment of the right" to judicial relief "rather than face the conditions upon which [the right to judicial review] is offered or may be obtained."[10] When Defendants assert otherwise they attempt to mislead this Court.

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[8] *Ex Parte Young*, 209 U.S. 123, 147 (1908). The assessment of penalties for a violation of a compliance order is not only a possibility, but is a probability. *See* the excellent discussion of this issue by *Amici* at pages 9-12 of their brief: not only is the penalty increased, but also the probability of prosecution is significantly increased if a compliance order is violated ("EPA seeks cooperation and voluntary compliance . . . . Violations after receipt of notice also help *establish the knowledge element of environmental crimes*") *Id.* at 11 (Emphasis added); (EPA "places a high priority on enforcement of unpermitted discharges") *Id.* at 10 (Emphasis added); "EPA may require companies to restore wetlands following a determination, thus a person . . . faces . . . costly restoration requirements if he chooses to challenge EPA's assertion of jurisdiction by violating the compliance order" *Id.* at 10-11; and "violation of a compliance order will also typically result in increased civil or criminal penalties." *Id.* at 12.

[9] A similar statement was made by EPA officials to Petitioner during the meeting in the spring of 1991. Petitioner requested that EPA issue a *de minimis* fine so Petitioner could challenge EPA's jurisdiction. EPA refused to issue a *de minimis* fine and told Petitioner if the cease and desist order was violated EPA would seek the maximum penalties allowed by law.

[10] *Ex Parte Young*, 209 U.S. at 147.

III. DEFENDANTS REFER THIS COURT TO THE WRONG LEGISLATIVE HISTORY AND ONE INAPPLICABLE TO THE CASE AT BAR.

While admitting that in determining whether a particular statute precludes judicial review the proper reference is to the statute itself,[11] Defendants draw the attention of this Court, not to the legislative history of the Clean Water Act (CWA), that is the statute in question here, but to the Clean Air Act (CAA) – an act that has no application to the case at bar.[12] The question before this Court, given the importance of the right of judicial review and the seriousness of its denial,[13] is whether Congress intended to deny that right in its adoption of the CWA. Defendants' attempt to analogize to the CAA is without merit and should be ignored.

IV. DEFENDANTS' ATTEMPT TO CONVINCE THIS COURT THAT THE CLEAN AIR ACT IS THE SAME AS THE CLEAN WATER ACT FAILS.

Defendants attempt to persuade this Court that the legislative history of the CAA, which precludes judicial

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[11] "Whether a particular statute (here, the CWA) 'is intended to preclude initial judicial review is determined from *the statute's* language. . . . ' " Respondents' Brief at 8. (Emphasis added.)

[12] Respondents' Brief at 11.

[13] The mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. *The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent.*

Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967). (Emphasis added.)

review, is the same as the legislative history of the CWA, which is silent regarding judicial review. Yet the enforcement regimes of the two acts could not be more different and thus any attempt to analogize between the two must be resisted.

The CAA contains express and published standards against which conduct is measured. The amount of emissions permitted under the CAA is clear, as is what constitutes a violation of the CAA. As pointed out by *Amici*, the CAA has exact emission standards that are to be applied consistently.[14] Under the CAA, when emissions exceed a certain level, a violation of the law has occurred. A person charged with a violation will know that a violation has occurred.[15] However, with regard to the so-called "waters of the United States" provision of the CWA, there are no published standards. Instead, the decision as to what constitutes "waters of the United States," that is, what, for example, is a "wetland," is established on a case-by-case basis.

Defendants admit that they undertake determinations regarding "waters of the United States" "on a case-by-case basis, generally in the context of enforcement actions."[16] These case-by-case determinations are made against a standard that is clearly subjective, and that may or may not be applied: "[these factors] are neither exclusive nor regulatory; they are simply examples of the sort

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[14] Brief of *Amici* at 13.

[15] *Id.*

[16] Preamble to the National Pollutant Discharge Elimination System General Permit and Reporting Requirements from Concentrated Animal Feeding Operations, 58 Fed. Reg. 7620.

of factors EPA will *probably* apply in making individual determinat ns."[17] The result of this "absence of a uniform federal methodology" results "in inconsistent wetlands determinations for similar areas."[18] As *Amici* declare, "[t]h[e] dispute over the appropriate manual for use in wetlands determinations involves more than mere procedural flip-flopping. Which manual is used to identify and delineate wetlands can make a great difference in the amount of land considered to be wetlands."[19] Most importantly, for constitutional due process to be assured, a federal statute must provide a person with a clear standard against which his or her conduct can be measured.[20] Contrary to the assertion by Defendants, the

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[17] *Id.* (Emphasis added.)

[18] *United States v. Ellen*, 961 F.2d 462, 465 (4th Cir. 1992).

[19] Brief of *Amici* at 14, n. 12, citing National Research Council, *Wetlands: Characteristics and Boundaries* (1995) at 77-78 and Justin Lamunyon, *Wetlands and the Swampbuster Provisions: The Delineation Procedures, Options, and Alternatives for the American Farmer*, 73 Neb.L.Rev. 163, 173-174.

[20] It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. . . . we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. . . . if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters. . . .

Grayned v. City of Rockford, 408 U.S. 104, 107 (1972). This Court has applied this standard to civil matters. *See Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 498 (1982). The civil standard is described as "less strict" because "the regulated

CWA fails to provide that constitutionally required standard. While the CWA may not be void for vagueness on its face, if Defendants are correct that no judicial review is allowed in the face of a determination that private property is "waters of the United States," then the CWA is unconstitutional as applied. Defendants' attempt to analogize to the CAA to save the CWA from its constitutional infirmity are nonavailing.

CONCLUSION

Defendants' Opposition must be found wanting, not only for its failure to provide this Court with the relevant legislative history, but for its failure to set forth accurately the legal impact of the cease and desist order issued by the EPA. While admitting that "[t]he absence of judicial review may offend due process in extreme cases

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enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process." *Id.* Petitioner was denied either opportunity in the case at bar. Petitioner asked EPA if the sinkhole was "waters of the United States" and EPA said it was not. App. at 13. EPA then changed its position and declared the sinkhole "waters of the United States." App. at 13-14. This does nothing to "clarify the meaning of the regulation." It adds confusion. The reason this case is before this Court is because there is no administrative process that provides the necessary "meaningful review." There is no due process. The decision of the Tenth Circuit is in conflict with the holding of this Court since the decision below "encourage[s] arbitrary and discriminatory enforcement. . . . [and] allows [regulators] to pursue their personal predilections" contrary to the decisions of this Court. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

where 'the practical effect of coercive penalties is to foreclose all access to the courts,' " Defendants attempt to pretend that this case is not one of those "extreme cases." Yet, despite Defendants' obfuscation and misrepresentations, it clearly is. Certiorari should be granted.

Respectfully Submitted,

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